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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1979

No. 79-1272

WARDEN EVERETT I. PERRIN, JR.,
ET AL., Petitioners,

v.

RICHARD HENRY and ROBERT
A. STEIN, ESQ., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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February 15, 1980

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PETITION FOR A WRIT OF
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COURT OF APPEALS FOR THE
FIRST CIRCUIT

The Petitioners are Everett I. Perrin, Jr., Warden of the New Hampshire State Prison, John J. Sheridan, formerly deputy warden, Dennis Batchelder, and Wayne Cassavaugh, officers in the prison guard force,

and John Doe, a New Hampshire state prison door guard. Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 21, 1979.

OPINION BELOW

The opinion of the Court of Appeals appears at 609 F.2d 1010 (1979), and is reproduced in the Appendix at page 42 hereof. Likewise, the opinion of the District Court for the District of New Hampshire is reproduced in the Appendix at page 51 hereof.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on November 21, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Fourth and Sixth Amendments operate to invalidate a

state prison policy requiring attorneys visiting inmate-clients to submit the contents of their briefcases, folders, books, etc., to a routine inspection for contraband as a condition of entry, where the inspecting guard makes no attempt to read any privileged material contained therein and the inspection is conducted in the presence of the visiting attorney?

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment

IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ...

United States Constitution, Amendment

VI

> In all criminal prosecutions, the accused shall enjoy the right to . . .have the assistance of counsel for his defense.

New Hampshire State Prison Policy,

dated March 20, 1978

Subject: Search of Containers

Purpose: To establish a policy that will reduce the ability to introduce or remove unauthorized items into or from the New Hampshire State Prison.

Policy: All containers, bags, boxes, lunch pails,

briefcases, and purses entering or leaving the institution will be presented to the guard at the front door or other point of egress by the transporter for examination. No one is exempted from this policy regardless of his or her position on the staff, unless escorted by the Warden or his Deputy. The guard has been instructed to deny access to anyone who fails to comply.

RATIONALE: Recent evidence indicates that staff members and visitors have unwittingly introduced into or removed unauthorized items from the institution. The aforementioned also guards against the misuse of State property.

/s/ Everett I. Perrin, Jr.
Everett I. Perrin, Jr.
Warden

New Hampshire State Prison Regulation

301.05

301.05 Search and Inspection of Material Subject to an Attorney-Client Privilege

[The text of this regulation is comparatively voluminous, and, therefore, it is set forth in the Appendix at page 37.]

STATEMENT OF THE CASE

Respondents initiated this action for declaratory and injunctive relief and compensatory and punitive damages, as well as attorneys' fees, in the district court, invoking its jurisdiction under 28 U.S.C. §1331 (general federal question jurisdiction) and §1334 (civil rights actions). The pertinent facts are fully set out in the district court opinion as well as the opinion of the court of appeals, (Appendix at 51 and 42, respectively), but can be briefly summarized as follows

On September 6, 1978, Attorney Robert A. Stein arrived at the New Hampshire State Prison in order to consult with Inmate Richard Henry, his court-appointed client in a pending

criminal prosecution. Attorney Stein carried a file folder with him which contained written notes, letters, and other documents related to Inmate Henry's defense effort. In accordance with the policy set out above, Attorney Stein was routinely asked by the entrance guard to turn over his file for visual inspection to ensure that it contained no contraband. Attorney Stein refused to do so, claiming that any required surrender or visual inspection of his file would constitute a violation of his Fourth Amendment rights and his and his client's Sixth Amendment rights.

Because he refused to submit his file for visual inspection for contraband, Attorney Stein faced two options:

(1) he could enter the prison and consult with his client without his file, or (2) he could simply decline to enter the prison. Attorney Stein chose the latter course.

Petitioners have repeatedly represented to the Respondents, to the District Court, and to the Court of Appeals, and the District Court found as a fact based upon the evidence presented[1/] that the visual inspection procedure does not entail reading or attempting to read any privileged

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1/ Order and Opinion, United States District Court for the District of New Hampshire, dated October 23, 1978, at p. 4, n. 6, and p. 8. Appendix, 54 and 58, infra.

material. And, it is uncontroverted that the visual inspection is performed in the presence of the visiting attorney.

Petitioners do not contest the fact that Attorney Stein was serving as Inmate Henry's criminal defense counsel at the time of his visit, nor do Petitioners contest the fact that Attorney Stein's folder contained material subject to a valid attorney-client privilege.

Relying on holdings in analagous cases upholding courthouse entry searches of attorneys' briefcases,[2/]

2/ McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978); Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972); Barrett v. Kunzig, 331 F. Supp. 266 (D. Tenn. 1971).

the district court entered summary judgment in favor of Petitioners, finding that "It is obvious that security practices in a prison should equal, if not exceed, those required in a public building such as a courthouse where citizens are largely free to come and go about their public affairs." Opinion of the District Court at 7.

On appeal, however, the court of appeals found that even a cursory visual inspection of the contents of a file containing privileged material necessarily impinges upon an inmate's Sixth Amendment rights to an impermissible extent, since such a visual inspection renders the privileged material "vulnerable to disclosure"

and, in any event, because such an inspection gives rise to a reasonable fear of meaningful disclosure on the part of both the inmate and the attorney concerned.

Petitioners have filed this petition for certiorari seeking review and reversal of the decision of the court of appeals, and rely essentially upon the holding of this court in Wolff v. McDonnell, 418 U.S. 539, 576-77 (1974), which is in direct and irreconcilable conflict with the holding below.

REASONS FOR GRANTING WRIT

1. The Decision of the Court of Appeals is in Direct Conflict with this Court's Decision in Wolff v. McDonnell, 418 U.S. 539, 577 (1974), as well as its own Previous Decisions and Decisions by Other Courts of Appeal.

The fundamental legal error permeating the decision of the Court of Appeals below is its holding that the Sixth Amendment bars state penal authorities from conducting visual inspections of the contents of briefcases or folders containing privileged material as a condition of entry to the institution, unless a "factual showing" is made of some actual threat to security in each particular case which cannot be adequately addressed by some other (presumably electronic) means. In Wolff v. McDonnell, this Court ex-

plicitly rejected any such notion, specifically holding that the mere possibility that contraband might be enclosed in an envelope containing privileged mail from an attorney "surely warrants prison officials' opening the letters." 418 U.S. 539, 577. This Court went on to reject any requirement of a case-by-case demonstration by penal authorities of a need to inspect privileged material, saying:

> We disagree with the Court of Appeals that this should only be done in "appropriate circumstances." Since a flexible test, besides being unworkable, serves no arguable purpose in protecting any of the possible constitutional rights enumerated by respondent, we think that petitioners, by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, have done all, and perhaps even more, than the Constitution requires. Id.

In the case at bar the district court found as a matter of fact that there was no attempt to read privileged material associated with the routine security inspection, and that the possibility of some inadvertent reading taking place during the cursory inspection (what the Court of Appeals later alluded to as the real danger of an ordinary guard's perceiving substantial "stroboscopic images") was de minimus. Needless to say, the district court judge heard the witnesses and was in the best position to determine the facts, and, since the facts found were based upon substantial evidence in the record, they obviously are not subject to reversal by the Court of Appeals. To be fair, it

must be pointed out that the Court of Appeals never actually reversed the factual findings of the district court, but, rather, attempted throughout its opinion to stress that this was somehow a legally novel and unique case requiring a "restricted ruling."

Petitioners respectfully disagree. The Sixth Amendment protections extended to privileged material do not vary depending upon whether the privileged material is mailed into the prison or is carried in, by an attorney. The legal rules remain constant: penal authorities may open and inspect letters, file folders, briefcases, boxes, bags, suitcases, or any other type or manner of container, whether mailed or carried in, to insure the

absence of contraband, but they may not read or attempt to read privileged textual material.[3/]

The Court of Appeals has refused to apply the holding of this Court, and instead has once again attempted to resurrect the "appropriate circumstances" analysis previously rejected in Wolf, and, not surprisingly, also rejected by the Court of Appeals itself in its earlier decision in Smith v. Robbins, 454 F.2d 696 (1st Cir. 1972). In Smith, the First Circuit

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3/ Actually, this Court has not yet even gone that far. In Wolff, supra, the Court indicated that prison authorities, by acceding to such a rule, had "done all, and perhaps even more, than the Constitution requires." Id. It remains to be decided whether under appropriate circumstances penal authorites may even read privileged material.

specifically held that inspecting does not mean reading, and that a cursory inspection procedure does not pose any cognizable risk that reading will take place:

> If the prisoner is present, he can see that the letter is not being read. That is enough. Id. at 697.

It simply is an unarguable and fundamental proposition of constitutional law that a state's general interest in maintaining prison security and order is more than sufficient to justify the slight and limited intrusion upon an attorney-client relationship occasioned by the opening and inspection for contraband of envelopes, folders, briefcases, or other items containing privileged material, so long as that material is not read, and the visitor is present

to insure that it is not being read, (thus obviating even an appearance of impropriety that might possibly chill the attorney-client relationship). Wolff v. McDonnell, supra; Smith v. Robbins, supra; Crowe v. Leeke, 550 F.2d 184, 186 (4th Cir. 1977); Taylor v. Sterrett, 532 F.2d 462 (5th Cir. 1976); Stover v. Carlson, 413 F. Supp. 718, 722 (D. Conn. 1976).

There is no legitimate distinction between the opening and inspection for contraband of privileged letters in the presence of the prisoner-recipient, and the opening and inspection for contraband of a privileged case file in the presence of an attorney. The legal principle involved is exactly the same -- privileged material entering a

penal institution is subject to visual inspection for the purpose of ensuring that no contraband is being introduced, so long as the inspection is carried out in the presence of the interested party and so long as no privileged material is subject to being read.

As the district court below pointed out, to date at least three federal courts have upheld cursory searches of the type ordered by the warden with respect to attorneys' briefcases and folders as a precondition to entry into federal and state courthouses. McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978); Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972); Barrett v. Kunzig, 331 F. Supp. 266 (D. Tenn. 1971). So even if some articuable distinction could have

been made between privileged mail and privileged files, that distinction is of no legal significance.

In McMorris, the Court of Appeals for the Ninth Circuit indicated that courthouse entry searches (inspection of attorneys' briefcases and parcels, but with specific instructions to guards not to examine written material) were valid and consistent with Fourth Amendment rights where the search is "limited and no more intrusive than necessary to protect against the danger to be avoided, but nevertheless reasonably effective to discover the materials sought." And, of course, the Court insisted that the search "must be conducted for a purpose other than the gathering of evidence for criminal

prosecution." McMorris, 567 F.2d at 899. The Court observed that such limited security inspections are not only "reasonable" under the Fourth Amendment, but they are also "consensual" where visitors are not physically coerced to submit, and may leave the premises at any time rather than submit:

> Although an attorney's consent to a search is exacted as the price of entering the courthouse to discharge duties necessary to his profession, the search is nevertheless consensual in the same way as in airport search cases. Id., at 901.

The security inspection policy promulgated by the warden of the New Hampshire State Prison meets every criteria of validity set forth in McMorris. The inspection is limited

and no more intrusive than necessary to protect against the danger to be avoided, that is, introduction into or removal from the prison of contraband (or state property). The inspection is not conducted for the purpose of gathering evidence for criminal prosecutions. Persons subject to the inspection are not coerced to submit; they may leave at any time. And, in any event, persons subject to the inspection impliedly consent to the inspection, thereby validating the limited intrusion at issue.

The instant case does not involve any restriction on the case with which attorney-client meetings can take place, such as were found in Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973), and Keker v. Procunier, 398 F. Supp.

756 (E.D. Calif. 1975), nor does it involve any compromise of confidential documents by reading or censoring content, nor does it involve any intrusion on the confidentiality of an attorney-client relationship by observation, interference or listening in on client conferences, as in Rhem v. McGrath, 326 F. Supp. 681 (S.D. N.Y. 1971). This case involves nothing more than a routine opening and inspection for contraband of all items carried into the prison, which is entirely consistent with established principles of constitutional law.

The Court of Appeals' decision reversing the District Court is based upon clearly erroneous legal principles, and is in direct and irreconcilable

conflict with this Court's dispositive decision on Sixth Amendment protections enunciated in Wolff v. McDonnell.[4/]

4/ In the Appendix, p. 37 hereof, Petitioners have set forth a new regulation enacted by the New Hampshire State Prison Board of Trustees in response to the First Circuit's opinion. The regulation does not alter the previous procedure in any material way, but seeks to make more clear exactly what that procedure entails. Respondents and the district court have both indicated their belief that this new regulation does not suffice, and does not meet the issues raised. This petition was filed in part because it appeared that even under the new regulation, the Respondents and court still anticipated a lengthy and expensive case-by-case factual hearing to determine the appropriateness of the inspection procedure.

2. Because of the Practical Effect of the Decision Below, the Issue Raised is Sufficiently Important to Warrant Review by the Supreme Court.

As discussed previously, the Court of Appeals has departed from this Court's precedent in at least two significant ways that will render it even more difficult for penal authorities to efficiently manage, and maintain security and order in their insitutions. First, the Court of Appeals has effectively granted to all attorneys the virtually unlimited ability to carry into prisons whatever they might choose, free from even a routine visual security inspection. Secondly, the Court of Appeals has apparently imposed upon prison administrators a new burden to factually demonstrate

in court the "appropriate circumstances" justifying a need to inspect the contents of particular containers holding privileged textual material.

Such case-by-case inspection requirements are unworkable; no regulation can possibly be drafted to account for every circumstantial permutation that might arise in the course of prison visits by attorneys. Furthermore, imposition of "probable cause" type requirements prior to allowing prison guards to visually inspect containers entering prisons poses a substantial threat to prison security and order, as a matter of law, and at the same time serves to protect no legitimate Sixth Amendment interest where there is no attempt to read or otherwise compromise

textual material. In fact, the district court was entirely correct in dismissing as de minimus the danger represented by a guard's theoretical ability to obtain and reveal "stroboscopic images" of textual material seen during the cursory inspection.

These newly imposed requirements are not only unjustified radical departures from established constitutional principles, but they serve to supplant the authority and discretion of prison administrators with that of the courts, a job for which the courts are ill-suited. See Bell v. Wolfish, ___ U.S. ___, 60 L.Ed.2d 447, 474 (1979).

The obvious deleterious impact of the decision below on the administration of penal facilities, as well

as the obvious constitutional error upon which that decision rests, clearly warrants Supreme Court review and reversal.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX

Regulation 301.05. 37

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301.05 Search and Inspection of Material Subject to an Attorney-Client Privilege

Material whose confidentiality is protected by an existing or past attorney-client privilege is, nevertheless, subject to a thorough and comprehensive search to insure the absence of contraband. However, in order to accommodate the recognized interests of prisoners and attorneys in maintaining the confidentiality necessary to effective legal representation to the maximum extent possible consistent with the prison's need to insure internal security, the following special procedures shall apply to attorneys seeking entry to the New Hampshire State Prison:

(a) Prior to entering the prison,

all visiting attorneys (including paralegals, law clerks, or other persons designated by an attorney as his agent) shall submit their persons and all books, briefcases, folders, files or other containers of whatever description being carried by them to a thorough and comprehensive search by the appropriate prison guard. The purpose of the search is to detect and prevent the introduction of contraband into the prison.

(b) At the time of surrender and prior to search, the attorney or his agent shall designate which materials in his possession, if any, are subject to an attorney-client privilege of confidentiality.

(c) The inspecting guard shall

search all material, including that designated as coming within the scope of an attorney-client privilege. However, material designated as privileged shall only be searched in the immediate presence of the visiting attorney or his agent.

(d) The inspecting guard shall not read or attempt to read any writing designated as privileged, nor shall the guard search privileged materials for, or in any way attempt to discover therein, contraband which is dependent upon its written or textual content for its contraband character (i.e., written or textual contraband). Specifically, the inspecting guard shall not scrutinize any material designated as privileged for textual contraband, but

shall merely look without reading, to insure that no other form of contraband is contained therein. The guard shall not conduct even a brief spot viewing of each, or any, page of confidential documents, but he shall open, flip through, separate, and look among such papers in a cursory, but sufficiently thorough, manner to insure the absence of concealed contraband other than textual contraband. The attorney shall insure that no attempt to read any confidential material occurs, and shall report any suspected violation to the Warden or his Deputy immediately.

(e) As a further condition to entry, the inspecting guard shall require a visiting attorney or his agent

to certify in writing on a form provided by the prison that no written or textual contraband, as described on said form, is contained in any material designated by said attorney as coming within the scope of an attorney-client privilege.

(f) The procedures set out herein pertaining to the inspection of privileged material sought to be introduced into the prison, shall also be applicable to privileged material upon departure from the prison.

United States Court of Appeals
For the First Circuit

No. 78-1528

RICHARD HENRY, ET AL.,
PLAINTIFFS, APPELLANTS,
v.
EVERETT I. PERRIN, ETC., ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. SHANE DEVINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
KUNZIG, *Judge, U.S. Court of Claims*,*
CAMPBELL, *Circuit Judge*.

Arpair G. Saunders, Jr., with whom *Robert A. Stein*, and *Stein & Viles*, were on brief, for appellants.

Steven J. McAuliffe, Assistant Attorney General, with whom *Thomas D. Rath*, Attorney General, was on brief, for appellees.

John Meyer, *Dennis Pizzimenti*, and *Bruce Kenna*, on brief, for the New Hampshire Civil Liberties Union, Merrimack County Public Defender's Office, Hillsborough County Public Defender's Office, and Merrimack County Bar Association, amici curiae.

November 21, 1979

COFFIN, *Chief Judge*. This appeal presents a novel question arising from a challenge to a prison's inspection policy which extends, at both entry and exit, to documents in attorney's file. Appellants are a New Hampshire prisoner, Henry, who has been charged with attempted escape and possession of implements of escape, and his court appointed attorney, Stein. Appellees are the warden and other prison officials and employees.

* Sitting by designation.

In March of 1978 appellee warden promulgated an inspection policy to "reduce the ability to introduce or remove unauthorized items into or from the . . . Prison." It provided that "All containers, bags, boxes, lunch pails, briefcases, and purses entering or leaving the institution will be presented to the guard at the front door . . . by the transporter for examination." The articulated rationale accompanying the policy statement was that recent evidence had indicated that "staff members and visitors have unwittingly introduced into or removed unauthorized items from the institution." The prison's Manual for the Guidance of Inmates defined as contraband "[a]nything that has not been specifically permitted by proper authority" and that was not listed as items permitted in an inmate's living area. Testimony revealed that contraband included escape plans, pornographic literature, money, and unauthorized letters from or to other prison inmates.

Appellant Stein, appointed to represent Henry in April, 1978, had gone to the prison on two occasions and submitted to a search of his briefcase, since nothing relevant to any client problem was contained therein and he urgently wished to see his client. On at least one other occasion there was no search conducted. On September 6, 1978, however, Stein was carrying only a manila file folder containing the results of his work to date in connection with the charges against Henry — witness reports, policy reports, Henry's criminal record, a written statement of Henry's version of the facts, Henry's suggestions as to trial strategy and tactics, memoranda of discussions of tactics, motions, pleadings, legal research papers, and notes of ideas which had occcurred to attorney Stein.

Stein uneventfully passed through a metal detector of the type used in airports. The guard on duty then asked him to turn over the file. After he refused, various negotiations with prison authorities led to a voluntary submission of the file to a state Supreme Court Justice, who made a page by page inspection, sealed the file, and noted that there was no contraband

in it. Despite this effort, any chance of peaceful settlement dissolved when attorney Stein was notified that even though he would be permitted entrance, in company with the state's attorney who would certify to the Justice's inspection, the file would still be subject to search on Stein's leaving the prison — to see if Henry had given Stein any contraband to take out.

Whereupon this suit was brought under 42 U.S.C. § 1983 seeking an injunction against searching Stein's "court files" on his entering prison, compensatory and punitive damages, and attorney's fees. The district court, after hearing, held that

> "[A]ny claim to the effect that the guards at [the prison] would necessarily read and report to prosecutors any privileged information in attorney's files is *de minimis* in nature in view of the cursory type of examination outlined by the testimony of Warden Perrin. Certainly, if such actions occcurred, discipline would be swift and sure, and any harm sustained to the client would be promptly remedied."

This case has proven obdurate to the parties, the position of appellants being utterly incomprehensible to appellees. To appellants' principal claim that their Sixth Amendment right to counsel is infringed by a policy which allows a prison guard to conduct a thorough visual inspection of the files a lawyer brings to prison, appellees have thought it a sufficient response that guards understood they were not to read privileged materials. Inspection, they contend, is not reading; and prison authorities have the right to inspect all visitors for possession of contraband. While appellees would have us conclude that this proposition disposes of this appeal, we view the novelty of the facts as requiring closer analysis.

The novel problem presented by this appeal arises from three factual configurations: the nature of the legal business occasioning the lawyer's visit; the nature of "contraband" under this prison's policy; and the nature of the inspection allowed.

First, as to the nature of the legal problem faced by lawyer and client, we deal with a complaint charging appellant Henry with attempted escape and possession of escape implements. This matter was therefore one in which prison authorities were not disinterested third parties but one in which they were deeply involved. Moreover, the locus of any activities relating to the crime and evidence thereof, real, documentary or testimonial, being likely to be within the prison, it is equally probable that the file of a lawyer investigating the charges and developing any defenses would contain — as was pretty much the case here — names of inmates or prison personnel as putative witnesses, their statements or summaries of what they might say, names and addresses of persons outside the prison, correspondence between client and lawyer, the lawyer's notes of conversations with his client, lists of things to investigate of both a factual and legal nature (such as a defense of alibi), photographs, and sketches. To the extent that a file reflected orderly, professional preparation it might well also be revealing in its size, captions, and index to prison guards familiar with the incident, locale, and cast of characters. In short, trial preparation materials in a case involving escape from prison must almost inevitably contain references uniquely within the knowledge and understanding of prison officials.

Second, as to the nature of "contraband", we face an expansive policy, including within its definition not only weapons, explosives, and drugs but, as the district court noted, "money, unauthorized letters . . . escape plans, pornographic literature, and other items." The warden testified that inmate correspondence with other institutions required his approval. Even a letter to an inmate from another institution, which was not authorized by the warden, was contraband. Thus the definition encompasses a wide variety of writings.

Finally, the inspection contemplated by the prison policy, as the district court noted, necessitated looking through each separate page of the attorney's file, even though the guard was

not interested in reading each page and was not expected to do more than ascertain whether contraband was present. The warden's testimony tended to proceed in two directions, stating that guards understood they were not to read privileged material but acknowledging that some reading would take place. An envelope from an inmate in another institution, bearing his return address, could be noted. Letters from inmates in the institution to an inmate in another institution would also be observed. As the warden explained, "[I]f we are looking for outgoing mail being smuggled out or mail being smuggled in, [the guard] would have to know what the address said." The guard would "[r]ead a loose envelope, an address on an envelope." The warden acknowledged that if an attorney's file contained an envelope, the guard would have to open the envelope to see whether contraband was inside it. We observe that, wholly apart from any special facility in speed reading, an individual's ordinary perceptions of briefly viewed phenomena, such as stroboscopic images, can be substantial.

This, then, is the conjunction of circumstances — a pending criminal charge involving alleged events within the prison, a definition of contraband which, for some categories, depends upon the substance of written documents, and a type of inspection which involves some visual scrutiny of individual pages by prison guards. Each of these factors sets this case beyond any authority that has been cited to us. Unlike the situation in *Wolff* v. *McDonnell*,418 U.S. 539, 576 (1974), where the nature of the legal matter requiring counsel could have been civil, the issues here were not only clearly confined to criminal charges but to charges arising out of events taking place within the prison. Here, also, the nature of contraband included textual material, the content, source, or addressee of which determined its contraband status, unlike the circumstances of *Smith* v. *Robbins*, 454 F.2d 696, 697 (1st Cir. 1972)("By contraband is meant some physical object in addi-

tion to the attorney's letter");*Downing* v. *Kunzig*, 454 F.2d 1230, 1231 (6th Cir. 1972) ("bombs or other potentially harmful devices");*McMorris* v. *Alioto*, 567 F.2d 897, 899 (9th Cir. 1978) (weapons); and *Barrett* v. *Kunzig*, 331 F. Supp. 266, 270 (D. Tenn. 1971) ("firearms or explosives").

Finally, the type of inspection called for under the warden's policy contemplates a minimal scrutiny of individual pages to see if the addressee or writer of correspondence is within the authorization previously given, to see if literature is pornographic, or to see if any writing has to do with escape plans. Contrasted with this is the mere opening of the briefcases to look for weapons and explosives in *Downing*, *McMorris*, and *Barrett*. In each of these cases it was clear that there was no reading , *Barrett*, *supra*, 331 F. supp. at 270, or examination of attorney's papers, *Downing*, *supra*, 454 F.2d at 1232; *McMorris*, *supra*, 567 F.2d at 899.

It is instructive also to trace the change in position on the part of the prison authorities in *Wolff* v. *McDonnell*. A Nebraska prison regulation provided that "[a]ll incoming and outgoing mail will be read and inspected." *Wolff* v. *Donnell*, *supra*, 418 U.S. at 574. The justification for this regulation on appeal was similar to that advanced by appellees in this case.

> "Insofar as incoming mail is involved, opening it is the only way such things as drug impregnated stationery, paper money or other type material may be discovered. . . ." *McDonnell* v. *Wolff*, 483 F.2d 1059, 1066-67 (8th Cir. 1973).

When the case came before the Supreme Court on certiorari, the Court noted that the prison authorities "now concede that they cannot open and *read* mail from attorneys to inmates."*Wolff* v. *McDonnell*, *supra*, 418 U.S. at 575 (emphasis in original). The narrow question was whether letters from attorneys may be opened in the presence of the inmate. The Court, in answering affirmatively, was confident that this would not chill communications since the mail would not be

read. This confidence, it seems to us, arose not only from the presence of the inmate but from the implicit assumption that contraband was something that could be discerned without reading words: "The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials' opening the letters." *Id.* at 577.

All of these considerations lead us to conclude, on anaylsis, that the district court's action in discounting the danger of intruding upon appellant Henry's Sixth Amendment right to the effective assistance of counsel as "de minimis", and threatening swift and sure discipline for any prying, while facially appealing as common sense, is neither principled nor practicable. Given the fact, as we have noted, that appellant Henry's Sixth Amendment right to counsel is directly impinged upon, i.e., that important and privileged information in a lawyer's file is vulnerable to disclosure, or at least that the fear of meaningful disclosure is reasonable, by even a brief spot viewing of each page, it is not open to us to deny relief on the ground that harm has not yet occurred.[1] While the Court spoke to a slightly different issue, we think its statement in *Glasser* v. *United States*, 315 U.S. 60, 76 (1942), is applicable here: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *See also Smith* v. *Robbins*, *supra*, at 697. Enough has been shown to place upon the prison authorities the task of demonstrating that the legitimate purposes of the institution cannot be equally well served by means less threatening to individual constitutional rights. We stress that we confine this ruling to the particular congeries of facts before us: a page

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[1] Similarly, in *Coplon* v. *United States*, 191 F.2d 749 (D.C. Cir. 1951), the court, having found that government eavesdropping on a conversation between defendant and his counsel violated the Fifth and Sixth Amendments in principle, thought it unnecessary to inquire whether defendant suffered actual prejudice. *See id.* at 759.

by page scrutiny for textual contraband by a prison guard of an attorney's file relating to the defense of his inmate client against a charge of attempted escape.

The nexus between the perceived threat to institutional order and security and the present inspection policy merits further exploration. In view of the avowed rationale to avoid the unwitting transportation of contraband by visitors, the possibility is suggested of notifying attorneys of the kinds of contraband which would involve some reading or scanning to identify and which have been unwittingly carried into prison, e.g., money, checks, unauthorized correspondence; and of requiring a certification that no such items are in the possession of the attorney. This would seem to avoid the possibility that an inmate's file would innocently contain such contraband.[2] The kind of routine opening, looking and feeling search approved in *Smith* v. *Robbins* and *Wolff* v. *McDonnell* could then suffice to meet the prison's remaining concerns. As for attorneys deliberately disobeying the regulations, the warden testified that he had not been aware of any intentional violations of contraband rules by an attorney. In any event, since attorneys are not personally subjected to search, they could, if so disposed, secrete any contraband on their person.

While we might go on to speculate on the relative efficacy of solely tactile searches, use of fluroscopes, magnetometers, and other detectors, visual but not auditory surveillance of lawyer-inmate exchanges, before and after searches of inmates, use of nonprison inspectors, and possibly other means, the very listing of such approaches indicates a job not yet done by the district court. It may be that on remand, a way may be found to harmonize the interests of the prison without impinging on

[2] The warden denied that notice would eliminate unintentional violations by attorneys, but his rationale for this opinion, i.e., that people are absentminded, is unpersuasive when weighed in the balance against Sixth Amendment rights.

appellant's right to counsel or that the institution will itself discern better ways of meeting its real needs. We therefore vacate the judgment and remand the case to the district court with instructions that it receive evidence on the issue whether the needs of the prison can be served with less actual or reasonably feared infringement upon an inmate's right of counsel than the present inspection policy as applied to documentary materials.

We have addressed only the issue of the propriety of the district court's refusal to give injunctive relief. No other issue was discussed in the briefs. While technically the issues of compensatory and punitive damages may not be considered as waived, we would see little likelihood of appellants being able to establish the requisite bad faith or disregard of obvious law to justify any damages award. As we have taken pains to note, this case has presented a novel factual background leading to our restricted ruling.

The judgment is vacated and the cause remanded to the district court for further proceedings consistent with this opinion.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW HAMPSHIRE

Richard Henry;
Robert A. Stein

v. Civil No. 78-304

Everett I. Perrin, individually and as Warden of New Hampshire State Prison;
John J. Sheridan, individually and as Deputy Warden of New Hampshire State Prison;
Dennis Batchelder, individually and as a Captain at New Hampshire State Prison;
Wayne Cassavaugh, individually and as a Lieutenant at New Hampshire State Prison; and
John Doe, individually and as a Guard at New Hampshire State Prison

ORDER AND OPINION

Plaintiff Henry is an inmate at New Hampshire State Prison (NHSP), and is currently charged under two indictments in the Merrimack County Superior Court. Plaintiff Stein is a member of the New Hampshire Bar, appointed by said court to defend Henry on the trial of these indictments. Defendants are the Warden, Deputy Warden, and officers and a guard at NHSP.

Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331, 1343; 42 U.S.C. § 1983; the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; and pendent claims under the state constitution and statutes. Plaintiffs seek injunctive relief, compensatory damages, and attorney's fees. Defendants move to dismiss for failure to state a claim and for attorney's

fees, and plaintiffs move for a preliminary injunction. The matter came before the Court for a hearing, and testimony was taken, the Court heard oral argument of counsel, and the pleadings and legal memos have been examined.

On March 20, 1978, defendant Perrin, as Warden of NHSP, issued a directive (Defendants' Exhibit B) outlining the procedure to be followed relative to the search of all visitors entering or leaving NHSP.[1] Perrin, who has had extensive experience in penological institutions, testified that such searches were necessary to bar the entry or removal of contraband from the prison. He further testified that his own briefcase was subject to such inspection on his entry and exit from the prison premises. Contraband is not limited necessarily to items which could be fashioned into weapons or could assist escape, but also includes money, unauthorized letters, drugs, escape plans, pornographic literature, and other items. It appears that despite such requirements for search, contraband has still been found on the prison premises.[2]

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[1] The directive stated in pertinent part:

> All containers, bags, boxes, lunch pails, briefcases, and purses entering or leaving the institution will be presented to the guard at the front door or other point of egress by the transporter for examination. No one is exempted from this policy regardless of his or her position on the staff, unless escorted by the Warden or his Deputy. The guard has been instructed to deny access to anyone who fails to comply.

[2] Large sums of money have been found concealed in the visitors' room after visiting hours, and on at least one occasion, an attorney unintentionally transmitted to his inmate client checks for large sums of money. The possession of these checks was inadvertently discovered when the inmate attempted to procure the assistance of his work supervisor in cashing same.

On September 6, 1978, plaintiff Stein came to NHSP with a file that contained various materials gathered and prepared by him to assist in the defense of Henry. He passed through a metal detector with the file, and was then advised by the guard on duty that he would have to turn over the file for inspection.[3] Stein refused to turn over his file because he felt that it would be a violation of the attorney/client privilege and in derogation of the constitutional rights of both himself and his client. He sought the assistance of defendant Cassavaugh, who left the room to check with his superior, and then returned and advised that he would have to submit to the inspection of his file. Request was made that contact be further attempted with the office of the Warden,[4] and Cassavaugh again left and returned to advise Stein that the file would have to be tendered up for inspection.

Stein refused to submit his file for inspection, and returned to his office where he engaged in telephone communication with the office of the Attorney General. He was advised by that office that they felt the inspection requirement was reasonable and was not a derogation of the rights of either himself or his client. Subsequently, Stein conferred with the County Attorney and the presiding judge,[5] and the judge conducted

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[3]Stein had gone through this procedure on previous occasions, but had not complained, as the papers or documents he then had did not contain, as alleged here, items that were both privileged and the result of his extensive work product.

[4]Defendant Perrin was not on the premises that date, and contact was therefore made with defendant Sheridan by defendant Cassavaugh.

[5]Douglas, J., of the New Hampshire Supreme Court, Sitting By Designation in Merrimack County Superior Court.

an in camera examination of the file, sealed it in an envelope, and certified on the envelope (Plaintiffs' Exhibit 1) that the examination revealed the presence of no weapon or contraband.

Because it was late in the day, Stein sought the assistance of the County Attorney in gaining him entry with the file thus sealed on the morning following. Telephone contact was made with defendant Perrin, and while the evidence here is in conflict, it appears that Perrin was willing to allow the file thus sealed to enter the prison, provided that it was locked away in safe-keeping overnight and that someone who had been present at the time of certification accompanied Stein to the prison with the file. After some consideration, Stein rejected this suggestion.

It is uncontroverted that Stein was duly appointed counsel for Henry, and no claim is here advanced that his file did not contain privileged material and his own work product prepared for the defense of Henry. The issue before the Court is whether the requirement of inspection of the file for contraband[6] constituted an infringement upon the plaintiffs' civil and constitutional rights of access to the courts and counsel.

Defendants, relying on Wolff v. McDonnell, 418 U.S. 539 (1974) and its progeny concerning the requirement that incoming mail to inmates from attorneys must be opened in the presence of the prisoner,[7] argue that the instant action does not involve the infringement of any civil or constitutional rights and should be dismissed. Plaintiffs argue that the "mail cases"

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[6]Perrin testified that although it would be necessary for the guard on duty to look through the various separate pages of the file, the guard was not interested in reading each page, and was not expected to do more than ascertain whether contraband was present.

[7]See Laaman v. Helgemoe, 437 F. Supp. 269, 322 (D. N.H. 1977).

are inapposite, and that they are entitled to immediate injunctive relief.

This is not a case where an inmate at NHSP has been denied the right of access to counsel. The evidence is clear that numerous attorneys come and go in the prison and that, prior to the institution of this litigation, they apparently raised no complaints about the inspection process. Nor does this case involve the destruction of any legal material gathered for or prepared to aid in the defense of a prisoner. The single issue to be resolved is whether NHSP can impose on all visitors the requirement of search.

In the course of the hearing, the defendants introduced into evidence (Defendants' Exhibit A) the Order of this court granting to United States Marshals the right to search the person and property of anyone entering the courtroom for concealed weapons. On at least three reported occasions, attorneys have unsuccessfully challenged such courthouse inspections. Barrett v. Kunzig, 331 F. Supp. 266 (D. Tenn. 1971), cert. denied, 409 U.S. 914 (1972); Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972); McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978).

In Barrett, the General Services Administration because of bomb threats, bombings, forced entry, and disturbances in Government buildings had established regulations to insure security in such buildings. These included a search of packages and briefcases in the United States Courthouse in Nashville, Tennessee. Barrett, an attorney, came upon the premises to appear for a defendant in a criminal case, and demanded of the employee assigned to inspection the right to proceed directly to the courtroom without any inspection of his briefcase. He

was given the option of opening his briefcase for a visual inspection, or leaving same in the custody of an attendant while he proceeded into the building, or carrying it with him without inspection but in the company of the security guard. He refused his options, and brought action (including as a class of plaintiffs all attorneys admitted to practice in the United States District Court in his district). His request for injunctive relief was denied, and the case was dismissed, and in the course of its opinion, the court said (331 F. Supp. at 274):

> These plaintiffs also assert that the Sixth Amendment is violated since they have been appointed counsel for defendants charged with a crime. They assert that the visual inspection of packages and briefcases for firearms and explosives is an infringement of this right. It is true that a defendant is guaranteed counsel. However, the cursory inspection at issue here does not infringe upon effective representation of a client by counsel. No restriction on representation of a client or any prying into confidential matters is involved here.

In Downing, the plaintiff, a practicing attorney from Detroit, entered the federal building with his briefcase in hand, en route to a hearing in one of the district courtrooms. He was likewise stopped by a guard and advised that under the GSA regulations must either submit his briefcase for inspection or leave it behind until he returned from the courtroom. He refused to do either, left the building, and sought a declaratory judgment that the search regulations were unconstitutional and void. A motion to dismiss was granted, and the action of the trial court was upheld.

In McMorris, the inspection procedures involved were in a state courthouse, pursuant to order of the superior court, and were conducted by city employees under the supervision of a

police captain. All visitors went through the metal detector, and briefcases and parcels were inspected. The plaintiff attorney brought an action in the federal district court pursuant to 42 U.S.C. § 1983 seeking damages, and declaratory and injunctive relief. Summary judgment in favor of the defendants was affirmed on appeal.

The reasoning of these cases is persuasive. The Court is well aware of the elaborate arrangements made for security on the premises where it performs its daily tasks. It is obvious that security practices in a prison should equal, if not exceed, those required in a public building such as a courthouse where citizens are largely free to come and go about their public affairs. In a recent extensive decision requiring sweeping changes in the living conditions and programs at NHSP, this court (Bownes, J.) has stated in pertinent part:

> Federal courts should be wary of intruding upon the domain of the state in administering its prisons and in monitoring the conduct of the prison officials. Prison administrators must be allowed great latitude in meeting their Herculean task of 'maintaining internal order and discipline, ... securing their institutions against unauthorized access or escape, and ... rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody.' Martinez, supra, 416 U.S. at 404, 94 S.Ct. at 1807. Prison is, by definition, 'a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so, ... [and who] may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life.' Wolff, supra, 418 U.S. at 561-62, 94 S.Ct. at 2977. Prison administrators must have broad discretion in determining how to fulfill their labyrinthine task. Laaman v. Helgemoe, supra at 307.

The Court finds on the record before it that any claim to the effect that the guards at NHSP would necessarily read and report to prosecutors any privileged information in attorneys' files is de minimis in nature in view of the cursory type of examination outlined by the testimony of Warden Perrin. Certainly, if such actions occurred, discipline would be swift and sure, and any harm sustained to the client would be promptly remedied. This Court would act in similar fashion should the security assigned to its working premises involve any such breach of responsibility.

For the reasons herein set forth, the plaintiffs' motion for preliminary injunction is denied. Inasmuch as evidence has been taken, the defendants' motion to dismiss is treated as a motion for summary judgment, and summary judgment is hereby entered in behalf of all defendants. Costs and attorneys' fees are awarded to neither party.

SO ORDERED.

Hugh Bownes
United States District Judge

October 23, 1978

cc: Robert A. Stein, Esq.
Steven J. McAuliffe, Esq.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 78-1528.

RICHARD HENRY, ET AL.,
Plaintiffs, Appellants,

v.

EVERETT I. PERRIN, ETC., ET AL.,
Defendants, Appellees.

JUDGMENT

Entered November 21, 1979

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is vacated and the cause is remanded to that court for further proceedings consistent with the opinion filed this day.

By the Court:

/s/ DANA H. GALLUP

Clerk.

[cc: Messrs. Saunders, McAuliffe and Meyer.]

JUDGMENT ON DECISION BY THE COURT — CIV 32 (7-63)

United States District Court
FOR THE

DISTRICT OF NEW HAMPSHIRE

CIVIL ACTION FILE NO. 78-304

Richard Henry and
Robert A. Stein

vs.

Everett I. Perrin, Jr., Individually
and as Warden of New Hampshire State
Prison, et al

JUDGMENT

This action came on for ~~trial~~ (hearing) before the Court, Honorable Shane Devine, United States District Judge, presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged judgment in accordance with Order and Opinion dated October 23, 1978.

Dated at Concord, New Hampshire, this 23rd day of October, 1978.

/s/ William H. Barry, Jr.
Clerk of Court

cc: Robert A. Stein, Esq.
Steven J. McAuliffe, Esq.